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IN THE

Supreme Court of the United States

..... Term, 196...

No. 238

TAX REVIEW BOARD OF PHILADELPHIA,
Petitioner,

Against

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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SUPREME COURT OF THE UNITED STATES

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Against

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on March 14, 1967, reversing a judgment in favor of the Petitioner.

OPINION BELOW.

The Opinion of the Supreme Court of Pennsylvania (Appendix D, App. p. 32) is reported in 424 Pa. 355 (1967).

The Opinion of the Court of Common Pleas of Philadelphia (Appendix C, App. p. 24) (R. 28a) is not reported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania (Appendix D, App. p. 32) was dated and entered on March 14 (1967). The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTION PRESENTED.

Where a producer of gasoline separately lists in its invoices to its customers the Federal Manufacturer's Excise Tax imposed by Section 4081 of the Internal Revenue Code of 1954 (26 U. S. C. A. §4081) upon gasoline sold by the producer may such producer exclude from its gross receipts under the Mercantile License Tax of the City of Philadelphia the amount of such excise tax on the ground that the producer is only a collection agent for the United States under the Internal Revenue Code?

(Answered in the affirmative by the Supreme Court of Pennsylvania.)

STATUTORY AND REGULATORY PROVISIONS INVOLVED.

The pertinent provisions of the Statutes and Regulations of the United States are set forth in Appendix A, *infra*, page 16.

STATEMENT.

There is no dispute as to the facts. The Esso Standard Division of Humble Oil and Refining Company ("Humble"), a Delaware Corporation, is qualified to do business in the Commonwealth of Pennsylvania. It is engaged in the business of producing, refining, and transporting gasoline, lubricating oils, and other petroleum products and was a duly registered and bonded producer of gasoline under the Internal Revenue Code for the years in question.

When a sale is made by Humble, the purchaser receives an invoice which separately sets forth the products sold, gallonage of the products, the delivered price, the tax per gallon, the cost of each product and the total amount of the invoice. When Humble makes sales for export, for use on a vessel or aircraft, to a non-profit educational organization or to a state or local government it need not pay the tax. Farmers and other non-highway users may obtain a "refund" of the tax included in their sales price.

Humble on or before the 15th of the month, in accordance with the regulations of the Internal Revenue Service, pays over to the Federal Reserve Bank for the account of the United States Government the amount of the Federal manufacturers' excise tax on taxable sales of gasoline during the previous month, whether or not it collects the total sales price from its customers.

The Department of Collections of the City of Philadelphia made an additional assessment of $29,336.71 against Humble on the basis of an understatement of its gross receipts because Humble had failed to include in its total receipts for the years 1960 through 1962 that portion of the total sales price representing the Federal manufacturers' excise tax on gasoline sales.

Humble appealed the assessment to the Tax Review Board of the City of Philadelphia claiming it was collecting these Federal manufacturers' excise taxes as an agent of the Federal Government and hence these receipts were excludable from its gross receipts subject to the incidence of the mercantile license tax. The City took the position, before the Board, that the tax was on the producers or on the importer, as defined within the Revenue Code. At the hearing before the Board, the City stated the federal question involved in the following words: "The issue is, does the Federal Government consider this tax on the producer or do they consider it on the producer's purchaser?" (R. 9a). The Tax Review Board sustained the assessment, holding that the federal manufacturers' excise tax on gasoline is imposed directly on the producer, that they are part of the cost of goods sold and therefore are similar to the many other costs which go to determine the selling price. Upon appeal, the Court of Common Pleas of Philadelphia County, recognizing the federal question involved and accepting the City's position, affirmed the Tax Review Board's decision (Appendix C, p. 24) (R. 28a-29a), wherein it stated:

> "The sole issue involved is whether Esso [Humble] was acting as a collection agent of the Federal Government when it collected federal excise taxes from its customers and when it paid these taxes to the Federal Government. If, in fact, Esso was a collection agent, the excise taxes collected would be excluded from the gross receipts in computing the Philadelphia Mercantile License Tax. . . ."

* * * * * * * *

> "The City of Philadelphia, on the other hand, contends that the federal excise tax on gasoline collected by Esso [Humble] is a tax imposed upon Esso, the producer, that is not a 'user' tax, and that it, therefore, is properly excludable in Esso's gross receipts for it is a part of the cost of the products which are sold by the taxpayer".

Upon appeal to the Supreme Court of Pennsylvania, the same Federal question was raised by the City and recognized by the Court in its decision. However, that Court reversed the judgment of the Court of Common Pleas of Philadelphia and found in favor of the taxpayer.

REASONS FOR GRANTING THE WRIT.

The decision below is in basic conflict with the rationale of pertinent decisions of this Court and presents vital questions which have not been, but should be, decided by this Court. Those questions are of great importance to thousands of taxing authorities throughout the United States.

The decision below is in direct conflict with the most recent pronouncement by another State Supreme Court. *Sun Oil Co. v. Gross Income Tax Div.*, 238 Ind. 111, 149 N. E. 2d 115 (1958). Excluding the instant case, there are at least five (5) decisions by the highest State Courts interpreting the federal statutes and questions involved. The decisions all involve the intrepretation of Section 4081 of the Internal Revenue Code of 1954 (26 U. S. C. A. §4081) and its predecessor Section 3412 (a) of the 1939 Internal Revenue Code. There is no difference in the pertinent language in the two sections as these sections impose the tax on gasoline sold by the producer thereof. Three (3) State Courts have found that these Federal Statutes impose the incidence of the tax upon the producer making the sale.

Pure Oil Co. v. Alabama, 244 Ala. 258, 12 So. 2d 861, 148 A. L. R. 260 (1943); *Pure Oil Co. v. Joseph*, 295 N. Y. 1039, 73 N. E. 2d 911 (1947); *Sun Oil Co. v. Gross Income Tax Div., supra.* Two (2) State Courts, other than Pennsylvania, have found that the producer is a collection agent for the government and that the incidence of the tax is upon the producer's purchaser or the ultimate consumer. *Standard Oil Co. v. State*, 283 Mich. 85, 276 N. W. 908 (1937); *Standard Oil Co. of Indiana v. State Tax Commissioner of State of North Dakota*, 71 N. D. 146, 299 N. W. 447 (1941). These decisions do not specify upon whom the incidence of the tax is imposed, thereby leaving this important issue unanswered. The Pennsylvania Supreme Court decision indicates that the incidence is upon the ultimate consumer which would appear to be contrary to this Court's holding in *Indian Motocycle v. United States*, 283 U. S. 570 (1931). In discussing upon whom the Excise Tax is imposed this Court said at page 574:

> "We think it [the tax] is laid on the sale, and on that alone . . . Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer, or importer'; but *we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production, or importation. . . .*" (Emphasis added.)

The question, upon whom does the federal statute impose the incidence of this tax, is a federal question, and is of vital importance to the multitude of taxing authorities throughout the United States. This Court has clearly held that a State Court's interpretation of a federal statute is a federal question which may be determined upon certiorari. *Awotin v. Atlas Bank*, 295 U. S. 209, 213 (1935). Furthermore, this Court has specifically recognized its right, if not a duty, to grant certiorari to resolve conflicts between several States in their interpretation of federal tax statutes. *People of the*

State of Ill. ex rel. Robert L. Gordon v. United States of America, 328 U. S. 8 (1946).

The decision below, in support of its holding, cites two (2) cases of This Court for the proposition that excise taxes are imposed upon the purchaser. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928) and *Indian Motocycle Co. v. United States*, 283 U. S. 570 (1931). It is submitted that these cases do not stand for the proposition for which they were cited in the Court below. These cases hold that where the economic burden of the tax was passed on to a sovereign government the tax was an infringement on the immunity of the federal government in the *Panhandle* case and as to a municipal government in the *Indian Motocycle* case, from taxation. There is no language in either of these cases which says that the incidence of the excise tax is upon the purchaser. This interpretation is strengthened by Justice Stone's dissent in the *Indian Motocycle* case wherein he states (at pp. 581 and 582):

> "In the Panhandle Oil Case it was held that this *shifting of the burden* of a state tax from seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result.
>
> * * * * * * * *
>
> "Whatever factors determine whether the burden does in fact shift, I do not think it can be said that a tax paid by the seller in any given case necessarily burdens the purchaser either more or less because in form laid on the sale, as in the Panhandle Oil case, or upon transportation of goods sold f. o. b. destination, as in Wheeler Lumber Co. v. United States, 281 U. S. 572, 50 S. Ct. 419, 74 L. Ed. 1047, or on manufacture alone of articles intended for sale, see Cornell v. Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. Ed. 504, or on both manufacture and sale." (Emphasis added.)

The Mercantile License Tax of the City of Philadelphia is contained in Section 19-1001 et seq. of the Philadelphia Code. This tax has been held to be an excise tax on the privilege of doing business in Philadelphia measured by gross receipts. *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 612-613 (1953). Section 303 (a) (4) of the Mercantile License Tax Regulations sets forth the exclusions from the gross receipts in ascertaining the tax base. It provides:

> "The following receipts shall be excluded from gross receipts and shall be omitted from the tax base:
>
> "(4) taxes collected as agent for the United States of America . . . where the customer pays the tax."

Humble sought to have that part of its gross receipts representing the Federal manufacturers' excise tax excluded from its taxable gross receipts on the grounds that it collects these taxes as an agent for the United States of America, and, therefore, comes within the exclusion set forth in the mercantile license tax regulations. The answer to this issue depends solely upon whom the tax is imposed. If on Humble's customers, these sums are excludable, if upon Humble, they are not. In order to determine this basic issue we must examine the applicable parts of the Internal Revenue Code of 1954 and the Federal Tax Regulations, thereunder.

Section 4081 of the Internal Revenue Code of 1954 (26 U. S. C. A. §4081) provides:

> "(a) *In General*, There is hereby imposed on gasoline sold by the producer or importer thereof or by any producer of gasoline, a tax of four cents ($.04) per gallon."

Section 48.4081-1 (c) of the Treasury Regulations (26 C. F. R. §48.4081-1[c]) provides:

> "Liability for Tax. A tax imposed by §4081 is payable by the producer or importer making the sale of the gasoline."

It is a fundamental ruling of statutory construction that the intent of legislation is to be found in the statute itself. Where the words of the statute are plain it cannot be subtracted from or added to. It is respectfully submitted the meaning of the words of Section 4081 of the Internal Revenue Code are plain. That section imposed the tax on "gasoline sold by the *producer or importer thereof*. . . ." (Emphasis added.) Section 48.4081-1 (c) of the Treasury Regulations (supra) states that the tax is *"payable by the producer or importer making the sale"*. (Emphasis added.) This language is free and clear from all ambiguity. There is nothing in these words which would support the conclusion that the incidence of the gasoline Federal manufacturers' excise tax is upon the purchaser as the Court below concluded. Nor is there any language therein that would indicate that the producer is a collection agent for the Federal Government.

The City's interpretation is strengthened by examining other Federal excise taxes in pari materia. The Federal manufacturers' excise tax on automotive and related items, 26 U. S. C. A. §4061,[1] imposes a tax on articles "sold by the manufacturer, producer or importer . . ." The incidence of this tax has been interpreted to fall upon the manufacturer. *Martin's Auto Trimming, Inc. v. Riddell*, 283 F. 2d 503 (9th Cir. 1960).

In *Undercofler v. Capital Automobile Company*, 111 Ga. App. 709, 143 S. E. 2d 206 (Ct. of Appeals, Div. No. 3, 1965), it was held that the Federal manufacturers' excise tax upon automobiles "is an element of the cost of the property sold"

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[1] §4061 "Imposition of Tax.

"(a) Automobiles. There is hereby imposed upon the following articles . . . sold by the manufacturer, producer or importer a tax equivalent to the specified percent of the price for which so sold: . . ."

§26 C. F. R. §48.4061 (a)-1 (c).

"(c) Liability for tax. The tax imposed by section 4061 (a) is payable by the manufacturer, producer or importer making the sale."

and is includible in "gross sales" and "sales prices" as defined in the sales and use tax act. That opinion in discussing the manufacturers' excise tax upon automobiles said at p. 210:

> *"The manufacturers' excise tax upon automobiles* (26 U. S. C. [I. R. C. 1954] §4061) *is a tax liability resting directly upon the manufacturer* (26 U. S. C. [I. R. C. 1954] §4061), *and amounts to an expense of his incidental to the sale or lease* (26 U. S. C. [I. R. C. 1954] §4217) *or the manufacturers' own use* (26 U. S. C. [I. R. C. 1954] §4218) *of the manufactured article;* it is not a tax liability either of the intermediate dealer or of the ultimate purchaser. See Martin's Auto Trimming, Inc. v. Riddell, 283 F. 2d 503 (9th Cir.). To the dealer it is an element of 'the cost of the property sold' within the meaning of the unambiguous language of Code Ann. §92.3403 a (E), and hence, to the purchaser, a part of the sales price, just as much so as the manufacturers' cost of raw materials and labor as elements figuring in the 'sales price' as defined by this Code section. See Consolidated Distributors, Inc. v. City of Atlanta, 193 Ga. 853, 856 (2), 20 S. E. 2d 421. *The manufacturers' excise tax, but for separate billing to avoid payment of the Georgia Sales tax pro tanto, has at the time of retail no separate identity as a tax. While this excise tax is in practical effect 'passed on' to the purchaser, first by an increase in the cost of the property to the dealer, then by an increase in the purchase price, yet this circumstance does not* shift legal liability for payment of the federal tax and does not *change the essential character of the tax, which is part and parcel of the sales price and not an extraneous addition to it."* (Emphasis supplied.)

In *In Re Teletone Radio Corp.* (U. S. D. C., D. N. J.) 133 F. Supp. 739 (1955), the United States sought to designate as a special fund in trust (26 U. S. C. A. §3661) monies allegedly collected by the debtor consisting of the Federal

manufacturers' excise tax which it had passed on to its customers and as to which the United States contended the debtor was a collection agent for the United States. In rejecting the claim of the United States the District Court ruled that the manufacturer's excise tax was laid upon the manufacturer alone even though it may have included the amount of the tax in its total sale price to its customers.

Where the agency relationship has been created the language of the Internal Revenue Code and the Treasury Regulations has specifically set up this relationship. This is true of the Federal excise taxes on Transportation,[2] safe deposit boxes,[3] communications,[4] and cabarets.[5] The typical wording where this agency relationship is created may be found in the Federal excise taxes on communications which provides:

> "(a) In General.—
>
> (1) . . . there is hereby imposed on amounts paid for the following communications services a tax equal to the percent of the amount so paid specified in paragraph (2):
>
> Local Telephone Service
> Toll Telephone Service
> Teletypewriter Exchange Service
>
> *The taxes imposed by this section shall be paid by the person paying for the Services."* (Emphasis added.)

The Treasury Department in formulating its regulations as applicable to the communications Federal excise provides:

> *"Liability for a return of tax.* The taxes imposed by Section 4251 are payable by the person paying for the service and facilities furnished, and shall be paid to the person furnishing the services and facilities *who is re-*

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[2] 26 U. S. C. A. §4261 (d); 26 C. F. R. §49.4261-10, 26 C. F. R. §49.4264 (a)-1, and 26 C. F. R. §49.4264 (c)-1.

[3] 26 U. S. C. A. §4286, 26 C. F. R. §49.4286-1 (c).

[4] 26 U. S. C. A. §4251, 26 C. F. R. §42.4251-1 (d).

[5] 26 U. S. C. A. §4231; 26 C. F. R. §148.1-6 (c).

quired to collect the tax and return and pay over the tax in accordance with the applicable provisions of the regulations . . ." (Emphasis supplied.)

The comparable section of the gasoline excise tax regulation, Section 48.4081-1 (c) supra, does not contain similar wording or any other words which would create an agency relationship, but on the contrary, specifically states that "the tax . . . is payable by the producer."

Section 301.7512 of the Treasury Regulations (26 C. F. R. §301.7512-1) entitled "Separate Accounting for Certain Collected Taxes" enumerates a number of taxes in which an agency relationship has been created. Included in this list are all the excise taxes where this relationship exists. The excise tax on petroleum products is not among those listed. The maxim of statutory construction, *expressio unius est exclusio alterius* requires the conclusion that Federal manufacturers' excise tax on gasoline is not among those which are to be collected from the customer.

Furthermore, the Treasury Regulations concerned with Internal Revenue Practice, Sections 601.402 (c) (1) and 601.403 (d) (1) and (2). (26 C. F. R. §601.402 (c) (1) and 26 C. F. R. §601.403 (c) (1) and (2)) in dealing with the procedure for the collection of excise taxes distinguishes between excise taxes which are paid by persons liable for the tax and those excise taxes which are required to be collected from a third party. The manufacturers' excise tax on gasoline is not among the taxes listed for collection from a third party. Therefore, it can be stated that there is no regulation of the Treasury Department to support Humble's interpretation of the Internal Revenue Code that it is an agent for the United States in collecting the Federal manufacturers' excise tax on gasoline.

Moreover, Congress in classifying its excise taxes placed this tax under the general classification of "Manufacturers' Excise Taxes." If the tax is to be imposed upon the producer's purchasers, as petitioner contends, the tax would not have been placed under this classification but would

have been placed under the general classification of "Retailer's Excise Taxes" or under its own headings, as a number of the excise taxes are listed. However, Congress placed the gasoline excise tax with other excise taxes which are imposed upon the manufacturer. Therefore, it is submitted that the total invoice price which is received by Humble from its customers are includible in its taxable gross receipts.

The most recent appellate decision on point is *Sun Oil Co. v. Gross Income Tax Division*, 238 Ind. 111, 149 N. E. 2d 115 (1958), which resolved the identical issue involved herein. Indiana had a Gross Income Tax which permitted as a deduction from gross income, monies collected as an agent of the United States. There, as here, the sales invoices delivered to the buyers segregated and separately listed, the number of gallons sold, the sales price per gallon, the total sales prices and the amount of each tax imposed per gallon. The Court after reviewing all the facts and most of the arguments presented herein by Humble, ruled that the incidence of Federal manufacturers' excise tax on gasoline was upon the producer and not his customer and, therefore, the monies charged as taxes were part of Sun Oil's Gross Income. That court declared:

> "We fail to find anything within the Federal statutes, or regulations made pursuant thereto on producers' excise tax on gasoline and oils which in any way compels or authorizes the conclusion that the Federal tax was a fund to be collected from the buyers, and to be paid to the Federal government. The statutes do not make the producer a collecting agent or fiduciary for the Government. If that were the case the fund would be held upon trust, and should be kept or deposited in a separate account. The statute does not put the tax upon the retail purchaser, but it is laid upon the producer or manufacturer. Regulation Sec. 314.3 makes a sale on credit taxable. 'In the case of a sale on credit, it is immaterial whether or not the purchase price is

actually collected.' The general scope of the sections on the gasoline tax, the oil tax and the bond required clearly indicates the tax to be paid by the manufacturer or producer. Whether he passes the amount on to the buyer is immaterial in determining the liability for the tax."

In the leading case of *Lash's Products Co. v. United States,* 278 U. S. 175, 73 L. Ed. 251 (1929), it was ruled that the 10% tax on soft drinks sold by the manufacturer in containers should be calculated on the total sales price including the 10% tax and not on the amount of the sales price less the tax. The same result was reached in *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 226 P. 2d 549 (1951), where it was ruled that the annual privilege tax of the State of Arizona against gross proceeds of sales included all sums received by a retailer of personalty even though he separately billed to his customers the privilege tax he passed on to them and segregated amounts received.

The Treasury Department has ruled that when the gasoline is delivered to a wholesale distributor on a consignment basis, the consignor-producer remains liable for the Federal manufacturers' excise tax. The consignee is the conduit through which the producer transacts the sale and thus, the responsibility for reporting and paying the manufacturers' excise tax remains with the producer. The reasoning behind this opinion is that it is the sale which created the liability not the production. However, it is the producer upon whom the incidence of the tax is imposed. Revenue Ruling 63-80, C. B. 1963-1, page 217 (CCH Federal Excise Tax Reporter, paragraph 6261).

In the instant case the government looked solely to Humble for the money. Humble is not required by any section of the Internal Revenue Code or Treasury Regulations to pass on this tax. Similarly, there are no requirements that the tax be separately stated on the invoice and recorded separately in the books. The reasons for Humble's so doing

may be numerous, however, none are pertinent to the issue herein. Hence the only conclusion possible is that the incidence of the tax is upon Humble.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Court should issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

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APPENDIX A.

STATUTORY AND REGULATORY PROVISIONS.

26 U. S. C. §4061

"... There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold: ..."

26 U. S. C. §4081

". . . There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

26 U. S. C. §4231

". . . A tax of 1 cent for each 10 cents or major fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription. . . . The tax imposed under this paragraph shall be paid by the person paying for such admission."

26 U. S. C. §4251

". . . There is hereby imposed on amounts paid for the communication services or facilities enumerated in the following table a tax equal to the percent of the amount so paid as is specified in such table: . . . The taxes imposed by this section shall be paid by the person paying for the services or facilities."

26 U. S. C. §4261

". . . There is hereby imposed upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water, or air within or without the

United States a tax equal to 10 percent of the amount so paid. . . .

(d) *By whom paid.*—The taxes imposed by this section shall be paid by the person making the payment subject to the tax."

26 U. S. C. §4286

". . . There is hereby imposed a tax equivalent to 10 percent of the amount collected for the use of any safe deposit box. Such tax shall be paid by the person paying for the use of the safe deposit box."

26 C. F. R. §42.4251-1(d) (Communications)

"§42.4251-1 *Imposition and rates of tax*

(d) *Liability for, and return of, tax.*

The taxes imposed by section 4251 are payable by the person paying for the services and facilities furnished, and shall be paid to the person furnishing the services and facilities who is required to collect the tax and return and pay over the tax in accordance with the applicable provisions of the regulations contained in Subparts H and I of this part."

26 C. F. R. §48.4061(a)-1(c) (Motor Vehicles, Tires, Tubes, Tread Rubber, Gasoline and Lubricating Oil)

"§48.4061(a)-1 *Imposition of tax*

(c) *Liability for tax.* The tax imposed by section 4061(a) is payable by the manufacturer, producer, or importer making the sale."

26 C. F. R. §48.4081-1(c) (Gasoline)

"§48.4081-1 *Imposition and rates of tax*

(c) Liability for tax. The tax imposed by section 4081 is payable by the producer or importer making the sale of the gasoline. As amended T. D. 6574, Oct. 11, 1961, 26 F. R. 9575."

26 C. F. R. §49.4261-10 (Refunds and other Administrative Provisions of Special Application to facilities and Services Taxes)

"§49.4261-10 *By whom paid*

The tax imposed by section 4261 is payable by the person making the taxable payment for transportation or for seats, berths, etc., and is collectible by the person receiving such payment. See section 4264 (a) and (c) for special rules relating to payment and collection of tax."

26 C. F. R. §49.4264(a)-1 (Facilities and Services)

"§49.4264(a)-1 *Duty to collect the tax; payments made outside the United States*

Where payment is made outside the United States for a prepaid order, exchange order, or similar order for transportation which begins and ends in the United States or for seating or sleeping accommodations in connection therewith, the person furnishing the initial transportation pursuant to such order shall collect all the tax applicable to such transportation or accommodations. See section 4291 and the regulations thereunder for cases where persons receiving payment must collect the tax."

26 C. F. R. §148.1-6(c) (Monthly Returns and Payment of Excise Taxes)

"§148.1-6 *Reporting and payment of cabaret tax on amounts received by concessionaires*

(c) *Duties of Proprietor—(1) Collection of tax from concessionaire.*

The proprietor shall collect from each concessionaire within the time prescribed in paragraph (b) (1) of this section for payment of tax by the concessionaire to the proprietor, the amount of the tax which is payable by the concessionaire to the proprietor pursuant to

section 4231(6) and this section. Any amount of tax so collected by the proprietor is a special fund in trust for the United States."

26 C. F. R. §301.7512-1 (Miscellaneous Provisions)

"§301.7512-1 *Separate accounting for certain collected taxes*

"(2) . . . (i) The taxes imposed by section 4231(1), (2), and (3) on amounts paid for admissions, and the tax imposed by section 4231(6) on amounts paid for admission, refreshment, service or merchandise at any roof garden, cabaret, or other similar place, to the extent that such tax on amounts paid on or after January 1, 1959, is required to be collected by the proprietor of the roof garden, cabaret, or similar place from a concessionaire in such estblishment,

(ii) The taxes imposed by section 4241 on amounts paid as club dues,

(iii) The taxes imposed by section 4251 on amounts paid for communications services or facilities,

(iv) The tax imposed by section 4261 on amounts paid for transportation of persons and the tax imposed by section 4271 on amounts paid before August 1, 1958, for the transportation of property, and

(v) The tax imposed by section 4286 on amounts collected for the use of safe deposit boxes."

26 C. F. R. §601.403(c)(1) and (2) (Provisions Special to Certain Employment and Excise Taxes)

"§601.403 *Miscellaneous excise taxes collected by return*

(c) *Collection of tax*—(1) *Imposed taxes.*

The tax on charges made by cabarets, roof gardens and other similar places, the taxes on admission charges in excess of the established price, the tax on the first domestic processing of certain vegetable oils, and the tax on the manufacture of sugar, are collected in the

same manner as manufacturers' and retailers' sales taxes. See §601.402. The tax on the use of highway motor vehicles, tax on wages, the tax on hydraulic mining, and the tax on circulation other than of national banks are also collected by means of returns. The returns of the tax on wagers are required to be filed monthly; returns of tax on hydraulic mining and on the use of highway motor vehicles are required to be filed annually; and the returns of the tax on circulation are required to be filed on June 1 and December 1 of each calendar year.

(2) *Collected taxes.* The other miscellaneous excise taxes referred to in this section are imposed on the person making the payment for the admission, telephone, transportation or other service involved. These taxes are required to be collected by the theatre, telephone company, railroad, or other person receiving the payment. All taxes collected in this manner are held by the collecting agent in trust for the United States until deposited in accordance with the Depositary Receipt procedure or paid over to the district director. The collecting agencies are required to file returns and the tax is payable without notice from the district director, at the time fixed for filing returns. If the person from whom the tax is required to be collected refuses to pay it or, if for any reason it is impossible for the collecting agency to collect the tax from such person, the collecting agency is required to report to the district director for the district in which its returns are required to be filed the name and address of such person, the nature of the service or facility rendered, and amount paid therefor, and the date on which paid. Upon receipt of this information the district director will proceed against the person to whom the facilities were provided or the services rendered to assert the amount of tax due, affording such person the same informal con-

ference, protest and appellate rights as are available to other excise taxpayers. In addition, when a field or office audit of a collecting agency's records, or of a taxpayer's records discloses that the collecting agency failed during prior reporting periods to collect taxes due, the district director may assert such taxes directly against the persons to whom the facilities were provided or the services rendered, whether or not the collecting agency had attempted collection or the persons liable for the tax had refused payment thereof."

APPENDIX B.

CITY OF PHILADELPHIA

Tax Review Board

April 13, 1965

Opinion No. 65-2 Docket No. 40.02-J616

Esso Standard Division of
Humble Oil and Refining Company

This is a petition for review of deficiency assessments of Philadelphia Mercantile License Tax for the years 1960, 1961 and 1962 aggregating $29,336.71 plus interest and penalties. The facts and figures are undisputed; the sole question is one of law.

Petitioner is a producer of gasoline and other petroleum products subject to liability for the federal excise tax "imposed on gasoline sold by the producer . . ." by Section 4081 of the Internal Revenue Code of 1954. In invoicing its sales, Petitioner separately shows a charge for this Federal tax except when the purchaser is exempt. Petitioner, during the years in question excluded sums collected from its customers, as so invoiced and paid by Petitioner to the Federal government, from its gross receipts in computing its Philadelphia Mercantile License Tax. Petitioner contends that this was proper because Petitioner was, in effect, simply acting as agent for the government in collecting the tax which was not really part of its sales price nor part of its gross receipts. In so doing Petitioner points to Section 303 (a) (4) of the City's applicable Regulations which provides for the exclusion from the tax base of "Taxes collected as agent for the United States of America", listing among examples of such taxes "b. Federal excise taxes on

jewelry, furs and fur articles, toilet preparations and luggage." Petitioner argues that its position in respect of this tax is the equivalent in all respects of the position of the retailer with regard to the excise taxes on jewelry and furs.

The City on the other hand has made the assessments in question on the theory that the amount invoiced as Federal excise taxes are part of the sales price even though separately invoiced and, therefore, properly includible in gross receipts for purposes of computing Mercantile License Tax.

Thus, the sole question is whether this Federal tax is one imposed on the producer and passed along to its customer by including it in the price regardless of the method of invoicing or whether the producer acts as agent for the Federal government in collecting the tax from its customer and paying it over to the government. This issue is one of first impression in this Commonwealth but has been decided in a number of other jurisdictions with a resultant split of authority. The most recent case cited to us and the one in which the facts appear most closely to resemble those here under consideration reaches the conclusion that the producer is the taxpayer and not the agent of the government for collection from its customer. *Sun Oil Company v. Gross Income Tax Division of the State of Indiana*, 238 Inc. 111, 148 N. E. 2d 115 (1958). We believe this to be the better view despite certain aspects of the tax and its administration which create an aura of agency.

Accordingly, the petition is denied. However, we find that Petitioner acted in good faith, without negligence and with no intent to defraud and could reasonably have been misled by the City's own regulation, Section 303 (a) (4) described above. Therefore, all penalties and interest are hereby abated provided balance due is paid in accordance with the terms of new bill to be issued by the Department of Collections, or, if an appeal from this decision is taken, within thirty days after final determination by the Court and the rendering of a new statement reflecting the Court's decision.

APPENDIX C.

OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

Alexander, J. October 7, 1966

This is an appeal by the Esso Standard Division of Humble Oil from a decision of the Tax Review Board of the City of Philadelphia.

The facts involved in this case are undisputed. Esso is a producer of gasoline and petroleum products. Pursuant to Section 4081 of the Internal Revenue Code of 1954, Esso, as a "producer", is required to pay a federal excise tax amounting to four cents a gallon, on every gallon of gas it sells.

During the assessment period involved in this case (1960 to 1962), Esso collected $9,778,902 in federal excise taxes upon sales to its customers, which it paid over to the Federal Government. Esso excluded this sum from its gross receipts in computing its Philadelphia Mercantile License Tax for the years in question.

The Department of Collections of the City of Philadelphia assessed additional Mercantile License Taxes amounting to $29,336.71, against Esso contending that Esso should have included the $9,778,902 which it paid in federal excise taxes in its "gross receipts" for the purpose of computing its liability under the Philadelphia Mercantile License Tax.

Esso refused to pay the additional assessment and, thereafter, filed an appeal to the Tax Review Board which sustained the City of Philadelphia's position of assessing the additional taxes in question.

The sole issue involved is whether Esso was acting as a collection agent of the Federal Government when it collected federal excise taxes from its customers and when it

paid these taxes to the Federal Government. If, in fact, Esso was a collection agent, the excise taxes collected would be excluded from the gross receipts in computing the Philadelphia Mercantile License Tax.

The Philadelphia Mercantile License Tax Ordinance imposes a tax upon the "gross receipts" of businesses operating in the city. Section 19-1001 of the Ordinance defines Gross Receipts as follows:

> "(5) *Gross Receipts.* Cash, credits and property of any kind or nature received in, attributable to, Philadelphia from any business or by reason of any sale made or service rendered or commercial or business transaction occurring in Philadelphia."

Section 303 (a) (4) of the Mercantile License Tax Regulations, provides that, "taxes collected as agent for the United States of America . . . where the agent pays the tax", are not includible in the tax base, and accordingly, are not taxable.

In support of its argument that it is a collection agent, Esso contends that: "(1) the gasoline excise taxes which it collects for the federal government are not its receipts and may not be taxed by the city as such: (2) federal gasoline taxes are imposed by statute, not upon Esso, but upon sales of gasoline; (3) sales taxes are by nature collected by sellers but borne by buyers, and (4) the Congress of the United States has characterized federal gasoline excise taxes as 'user taxes . . . assessed (upon) users of the highway.'"

The City of Philadelphia, on the other hand, contends that the federal excise tax on gasoline collected by Esso is a tax imposed upon Esso, the producer, that is not a "user" tax, and that it therefore, is properly includable in Esso's gross receipts, for it is a part of the cost of the products which are sold by the taxpayer.

This position was adopted by the Tax Review Board in affirming the imposition of the tax in question.

Whether or not the Federal excise tax is imposed upon the sales or upon the production of gasoline and oil, is not controlling in this case. What is controlling is upon whom the tax is imposed—the producer or its customers. Under Section 48.4081-1 (c) (26 CFR 48.4081-1(c)) of the Internal Revenue Regulations, taxes imposed under Section 4081 of the Internal Revenue Code are "payable by the producer or importer making the sales of the gasoline."

Esso contends that this regulation along with the applicable provisions of the Internal Revenue Code, should be interpreted as meaning that the "producer or importer making the sale" is a collecting agent for the United States and that the incidence of the tax falls upon its purchasing customers. Whenever a collecting agency relationship has been created, the Federal regulations determining liability for payment of excise taxes have always specifically created the relationship. Federal Tax Regulation 26 CFR Section 42.4251-1 (d), relating to excise taxes imposed upon communications products, is illustrative:

> "The taxes imposed by Section 4251 are payable by the person paying for the service and facilities furnished, and shall be paid to the person furnishing the services and facilities who is required to collect the tax and return and pay over the tax in accordance with the applicable provisions of the regulations . . ."

Esso argues it is "immaterial" that the Internal Revenue Code and Regulations do not expressly provide that federal gasoline taxes are to be borne by the consumer. It contends that the Regulations and the legislative history of the statute demonstrate that Congress intended the incidence of tax to fall upon the consumer, and that it is, therefore, a collecting agent.

This position is not supported by Section 301.7512 of the Regulations, entitled, "Separate Accounting for Certain Collected Taxes." This section includes a list of all the excise taxes in which tax collection agency relationships have been

created. The excise tax on gasoline and oil is not included. Accordingly, one must conclude that Congress did not intend that producers of gasoline and oil were to be "collecting agents."

Furthermore, the legislative history of the amendment to Section 4082 of the Internal Revenue Code illustrates that Congress intended the incidence of Federal excise taxes on gasoline and lubricating oils to fall upon the producers and importers making the sales of those products.

In the House of Representatives' Report pertaining to Section 4082 of the Internal Revenue Code, the following is stated in regard to the incidence of the tax:

> "Under present law the Federal tax on gasoline is imposed on the producer or importer of the gasoline and is payable by him shortly after he makes the sale. This means that the refinery or major oil company on sales directly to a service station does not have to pay the tax until after its sale to a retailer, . . .
>
> "In addition, since the gasoline tax is based upon the volume of gasoline the wholesale distributor purchases, he not only pays tax on the volume of gasoline he resells but also on the gasoline he loses through evaporation and spillage . . . (t)his is (a) . . . payment which his integrated competitor does not have to make, since he pays tax only on the gasoline he sells and not on his losses through evaporation and spillage . . .
>
> "To remove these discriminations, this provision provides that a wholesale distributor is to be treated as a producer; that is, the wholesale distributor will be able to buy gasoline on a tax-free basis and pay the tax at the time he makes his sale."[1]

It appears that the above explanation clearly indicates that Congress did not intend to make producers of gasoline and oil collection agents of the United States.

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[1] House of Representatives Report #1120, 86 Congress, 1st Session, 1959, C. B. 1959-2, 871-879.

In classifying the excise tax on gasoline and lubricating oils, Congress placed the tax under the general heading of, "Manufacturer's Excise Taxes." If the incidence of the tax was intended to be upon the purchaser, Congress would undoubtedly have placed the tax under the general classification of "Retailer's Excise Taxes", or under a separate heading of its own.[2] Since Congress did not elect to do this, the position of the City in this case is supported thereby.

Esso contends that due to the size of the tax, it is inconceivable that Congress intended the tax to fall upon the producer. The wholesale price of standard grade gasoline is .153¢ per gallon. The excise tax imposed upon a gallon of standard grade gasoline is .11¢ (.04¢ for the Federal tax, and .07¢ for the Pennsylvania tax).

Although the Federal and State excise taxes on gasoline equal 71% of the wholesale price of the product, such is not controlling because the amount of a tax has no bearing upon whom the incidence of the tax is imposed.

Under the Code, the purchaser of gasoline and oil has no duty to pay the excise tax. The producer or importer making sales is solely responsible to pay the tax. The fact that the economic burden of the tax is ultimately passed on to the purchaser, is irrelevant *Dow Jones Co. v. United States,* 128 F. Supp. 748 (Ct. of Cl.; 1955), in which the court stated in regard to a Federal excise tax on business machines:

> ". . . He will, if possible, add the amount of the tax to the selling price, and thus pass on the economic burden of the tax to the purchaser. But the purchaser is not liable for the tax, and is not the taxpayer. In Lash's Products Co. v. United States, 278 U. S. 175, 49 S. Ct. 100, 73 L. Ed. 251, Affirming 64 Ct. Cl. 252, the Court said:
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> 'The phrase "pass the tax on" is inaccurate, as ob-

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[2] Many taxes are separately classified.

viously the tax is laid and remains on the manufacturer and on him alone. * * *

The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.' "

The taxpayer argues that the above case is not on point because the federal excise tax on business machines is measured by a percentage of the sales price of the machine and is therefore, "a kind of gross receipt tax on specific commodities." Also, Esso argues, that the tax involved in the present case is measured by the number of gallons sold and because it is not "measured by units other than dollars of receipts," it is a sales or user tax. This argument falls because it is clear that an excise tax which is not measured by the sales price of the commodity sold can be a tax which is imposed on the manufacturer.

In *F. & M. Schaefer Brewing Co. v. Gerosa,* 14 N. Y. 2d 25, 197 N. E. 2d 291 (1964), the court held the taxpayer had to include in its gross receipts the $9.00 per barrel Federal excise tax on beer, under the gross receipts tax of New York City.

The New York City tax is similar to the Philadelphia Mercantile License Tax, both being "privilege" taxes. The excise taxes on beer and gasoline are not imposed until a sale is made. Both taxes are measured upon a unit basis, rather than upon a percentage of the sales price.

The New York Court of Appeals stated as follows in the *F. & M. Schaefer Brewing Co.* case, supra, in regard to the incidence of the New York City tax:

"It is our view that federal excise taxes incurred by the petitioner in the production and sale of its beer constitute a 'cost of manufacturing and selling' such beer. . . . The federal excise tax on beer, . . . is a cost not only traceable but directly attributable to each barrel of beer brewed and sold by the petitioner. . . . As such, not only is it as much a cost of those activities as is the

amount paid for the ingredients of the beer, the barrels in which it is shipped and the labor employed in the manufacture. . . ."

Esso also argues that because Section 4221 of the Internal Revenue Code provides that no tax shall be imposed upon sales for export, or upon sales for use as a supply on a vessel or aircraft, or upon sales to a non-profit educational organization, or to a state or local government, that it would be inconsistent to make these exemptions from the tax if the incidence of the tax is, not in fact, borne by the seller.

This contention is similar to that made in regard to the refunds to which farmers and other consumers of gasoline for certain non-highway uses are entitled under the Internal Revenue Code. Esso argues that no refunds would be allowed if the incidence of the tax falls upon the producer.

The basic reason for allowing the refunds and exemptions referred to is, that it is understood that the seller will pass the tax on to his purchaser by including the tax in his sales price.

Because of the refunds, Esso argues that if the incidence of the tax falls upon the producer, "it is clear that (1) the tax as imposed upon producers is unconstitutional and/or (2) that the refunds as granted to certain users are unconstitutional. For obviously there is a deprivation of substantive due process when property is taken from one person and given to another regardless of whether this is done directly by confiscation or indirectly under the guise of taxation."

Clearly, the existence of the refund and exemption provisions are grounded in fact, in that they only apply in regard to gasoline and oil, to vehicles which are not normally used upon the public highways, such as farm vehicles. Moreover, it is begging the question to argue that the refunds amount to a taking of property from one person and giving it to another. The refund transactions are

clearly separate and apart from the incidence of the tax as it applies to this case.

Accordingly, the appeal of Esso Standard Division of the Humble Oil and Refining Company is dismissed, and the decision of the Tax Review Board of the City of Philadelphia is sustained.

RAYMOND PACE ALEXANDER,
J.

APPENDIX D.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: March 14, 1967.

EAGEN, J.

Section 4081 of the United States Internal Revenue Code of 1954 (26 U. S. C. A. §4081) provides:

> "(a) There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."[1]

Liability for payment of the tax is imposed upon the producer who makes the sale.[2]

The appellant, Esso Standard Division of Humble Oil and Refining Company (Humble) is the producer of gasoline and other petroleum products. Humble adds the amount of the above tax to the sales price of the gasoline it charges each purchaser, and the latter receives at the time of the sale an invoice separately listing thereon the charge for the product and the tax.

The question posed by this appeal is, whether that portion of the total sales price (on sales in Philadelphia), which Humble charges the purchaser and later returns to the United States government in payment of the tax, is part of its "gross receipts" for mercantile tax purposes, under the pertinent provisions of the Code of the City of Philadelphia.

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[1] Sales for certain specified uses are exempt from the tax. Also a refund to the purchaser is provided for if the gasoline is used on a farm for farm purposes.

[2] Section 48.4081-1 (c) of the Treasury Regulations (26 C. F. R. §4081-1-[c]).

The Department of Collection of the City of Philadelphia ruled that such sums should be included in the computation of Humble's "gross receipts" for mercantile tax purposes for the years 1960 through 1962. On appeal the Court of Common Pleas of Philadelphia County sustained the decision of the department and entered judgment accordingly. We granted certiorari under Rule 68½, and now reverse.

The Mercantile License Tax of Philadelphia's Code[3] is an excise tax on the privilege of doing business in that city, and is measured by the gross receipts of the business. See, *National Biscuit Company v. Philadelphia,* 374 Pa. 604, 98 A. 2d 182 (1953). However, the Mercantile Tax Regulations[4] exclude from "gross receipts," in ascertaining the tax base, "taxes collected as agent for the United States government, Commonwealth of Pennsylvania or City of Philadelphia, where the ultimate customer pays the tax.

The City of Philadelphia admits, as it must, that if Humble is a mere collector of the tax involved, such sums must be excluded in the computation of its taxable gross receipts. However, it argues earnestly and ably that under the code, supra, the tax is imposed solely on the producer, not the purchaser, and Humble cannot be deemed to be a collector of taxes imposed upon itself.

We agree that if the tax involved is truly a manufacturer's or producer's tax, the city's position is correct. We further agree that the mere fact the tax is passed on to the purchaser does not determine upon whom the tax is imposed. The economic burden of all taxes incident to the sale of merchandise is traditionally so passed on as part of the "overhead." In the same category is the circumstance of the purchaser receiving an invoice, separately listing the tax involved. Invoices or bookkeeping cannot change the nature or incidence of the tax. However, it is our con-

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[3] Section 19-1001 et seq.

[4] Section 303(a)(4).

sidered conclusion that the operative word in Section 4081 of the Internal Revenue Code, supra, is "sold," and the particular levy is a sales tax pure and simple. Further, the nature, the size of the tax in relation to the wholesale price of the product,[5] and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.

The revenue collected as a result of the tax does not go into the general treasury. Instead, it is placed in a special fund and is used solely to defray the cost of the federal highway system. It was designed to charge the motorists, who use the highways, with the cost thereof. It has been recognized and characterized by both the President and Congress of the United States as a "user tax."[6] Moreover, this conclusion is fortified by Section 6420(a) of the code itself, which provides for a refund *to the purchaser* if the gasoline is used on a farm for farm purposes.

Our ruling is supported by analogous federal court decisions. See, *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928); *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931). See also, *Standard Oil Co. v. State*, 283 Mich. 85, 276 N. W. 908 (1937); *Standard Oil Co. of Indiana v. State Tax Commission of North Dakota*, 71 N. D. 146, 299 N. W. 447 (1941); and, *Esso Standard Oil Co. v. City of Danville*, 45 C. L. O. 358 (Corp. Court of Danville, Va., 1950). It is also in line with a multitude of our own decisions:

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[5] The federal tax is equal to 26% of the wholesale price.

[6] See, President's Message to Congress, May 17, 1965. Also the report of the House Ways and Means Committee on H. B. 8371, 89th Congress, First Session (1965) at 1070-71.

"It is fundamental that taxing statutes and ordinances must be strictly construed and if there is any reasonable doubt as to the meaning intended, the doubt must be resolved in favor of the taxpayer and against the taxing authority: (citing cases)."

Don Allen Chevrolet Co. v. Pittsburgh, 414 Pa. 429, 433, 200 A. 2d 388 (1964). See also, *Tax Review Board v. Green,* 409 Pa. 448, 187 A. 2d 572 (1963).

Judgment reversed.